



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 18, 2022

Ms. Rachael Foster
Assistant District Attorney
Lubbock County Sheriff's Office
904 Broadway, Second Floor
Lubbock, Texas 79401

OR2022-14282

Dear Ms. Foster:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 945832 (ORR# 22-ORR-0093).

The Lubbock County Sheriff's Office (the "sheriff's office") received a request for information pertaining to a named individual and specified policies. The sheriff's office states it has released some information to the requestor. The sheriff's office claims some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we note some of the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2020-15716 (2020) and 2020-26523 (2020). In those rulings, we concluded, in relevant part, the sheriff's office must withhold certain information under section 552.101 of the Government Code in conjunction with sections 418.176, 418.181, and 418.182 of the Government Code. We have no indication the law, facts, and circumstances on which Open Records Letter Nos. 2020-15716 and 2020-26523 were based have changed with respect to the information at issue. Accordingly, to the extent the information at issue is identical to the information previously requested and ruled upon by this office, the sheriff's office must continue to rely on Open Records Letter Nos. 2020-15716 and 2020-26523 as previous

determinations and withhold the identical information in accordance with those rulings.¹ *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the information at issue is not encompassed by the previous ruling, we will consider your arguments against its disclosure.

Next, we note the requestor is a representative of Disability Rights Texas (“DRT”), which has been designated as the state’s protection and advocacy system (“P&A system”) for purposes of the federal Protection and Advocacy for Individuals with Mental Illness Act (“PAIMI Act”), 42 U.S.C. §§ 10801-10851, the Developmental Disabilities Assistance and Bill of Rights Act (“DDA Act”), 42 U.S.C. §§ 15041-15045, and the Protection and Advocacy of Individual Rights Act (“PAIR Act”), 29 U.S.C. § 794e. *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Attorney General Opinion JC-0461 (2002); *see also* 42 C.F.R. §§ 51.2 (defining “designated official” and requiring official to designate agency to be accountable for funds of P&A agency), .22 (requiring P&A agency to have a governing authority responsible for control).

The PAIMI Act provides, in relevant part, that DRT, as the state’s P&A system, shall have the authority to “investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the [P&A] system or if there is probable cause to believe that the incidents occurred[.]” 42 U.S.C. § 10805(a)(1)(A). Further, the PAIMI Act provides DRT shall

(4) . . . have access to all records of—

. . .

(B) any individual (including an individual who has died or whose whereabouts are unknown)—

(i) who by reason of the mental or physical condition of such individual is unable to authorize the [P&A] system to have such access;

(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and

(iii) with respect to whom a complaint has been received by the [P&A] system or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to

¹ In that instance, as we are able to make this determination, we need not address your arguments against disclosure of this information.

believe that such individual has been subject to abuse or neglect[.]

Id. § 10805(a)(4)(B). The term “records” as used in the above-quoted provision “includes reports prepared by any staff of a facility rendering care and treatment [to the individual] or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.” *Id.* § 10806(b)(3)(A); *see also* 42 C.F.R. § 51.41(c) (addressing P&A system’s access to records under the PAIMI Act). Further, the PAIMI Act defines the term “facilities” and states the term “may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons.” 42 U.S.C. § 10802(3). The DDA Act provides, in relevant part, that a P&A system shall

(B) have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;

...

(I) have access to all records of—

...

(ii) any individual with a developmental disability, in a situation in which—

(I) the individual, by reason of such individual’s mental or physical condition, is unable to authorize the [P&A] system to have such access;

(II) the individual does not have a legal guardian, conservator, or other legal representative, or the legal guardian of the individual is the State; and

(III) a complaint has been received by the [P&A] system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect[.]

Id. § 15043(a)(2)(B), (I)(ii). The DDA Act states the term “record” includes

(1) a report prepared or received by any staff at any location at which services, supports, or other assistance is provided to individuals with developmental disabilities;

(2) a report prepared by an agency or staff person charged with investigating reports of incidents of abuse or neglect, injury, or death occurring at such location, that describes such incidents and the steps taken to investigate such incidents; and

(3) a discharge planning record.

Id. § 15043(c). The PAIR Act provides, in relevant part, that a P&A system will “have the same . . . access to records and program income, as are set forth in [the DDA Act].” 29 U.S.C. § 794e(f)(2).

In this instance, DRT states the information at issue relates to a named individual who suffered from a disability and that DRT has learned of possible incidents of abuse and neglect of this individual. We understand DRT intends to investigate the provisions of medical and mental health services to this individual for possible incidents of abuse or neglect of an individual with a disability as governed by the PAIMI. *See* 42 U.S.C. § 10802(4) (defining term “individual with mental illness”).

A state statute is preempted by federal law to the extent it conflicts with that federal law. *See, e.g., Equal Employment Opportunity Comm’n v. City of Orange*, 905 F. Supp. 381, 382 (E.D. Tex. 1995). Further, federal regulations provide that state law must not diminish the required authority of a P&A system. *See* 45 C.F.R. § 1326.21(f); *see also Iowa Prot. & Advocacy Servs., Inc. v. Gerard*, 21A F. Supp. 2d 1063 (N.D. Iowa 2003) (broad right of access under section 15043 of title 42 of the United States Code applies despite existence of any state or local laws or regulations which attempt to restrict access; although state law may expand authority of P&A system, state law cannot diminish authority set forth in federal statutes); *Iowa Prot. & Advocacy Servs., Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D. Iowa 2001); *cf.* 42 U.S.C. § 10806(b)(2)(C). Similarly, Texas law states, “[n]otwithstanding other state law, [a P&A] system . . . is entitled to access to records relating to persons with mental illness to the extent authorized by federal law.” Health & Safety Code § 615.002(a). Thus, the PAIMI and the DDA Act grant DRT access to “records,” and, to the extent state law provides for the confidentiality of “records” requested by DRT, its federal rights of access under the PAIMI and the DDA Act preempt state law. *See* 42 C.F.R. § 51.41(c); *see also Equal Employment Opportunity Comm’n*, 905 F. Supp. at 382. Accordingly, we must address whether the information at issue constitutes “records” of an individual with a mental illness as defined by the PAIMI or a disability as defined by the DDA Act.

Although the definition of “records” is not limited to the information specifically described in sections 10806(b)(3)(A) and 15043(c) of title 42 of the United States Code, we do not believe Congress intended for the definitions to be so expansive as to grant a P&A system access to any information it deems necessary.² Such a reading of the statute would render

² Use of the term “includes” in section 10806(b)(3)(A) of title 42 of the United States Code indicates the definition of “records” is not limited to the information specifically listed in that section. *See St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202 (5th Cir. 1996); *see also* 42 C.F.R. § 51.41.

sections 10806(b)(3)(A) and 15043(c) insignificant. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (statute should be construed in a way that no clause, sentence, or word shall be superfluous, void, or insignificant). Furthermore, in light of Congress's evident preference for limiting the scope of access, we are unwilling to assume that Congress meant more than it said in enacting the PAIMI and the DDA Act. *See Kofa v. INS*, 60 F.3d 1084 (4th Cir. 1995) (stating that statutory construction must begin with language of statute; to do otherwise would assume that Congress does not express its intent in words of statutes, but only by way of legislative history), *see generally Coast Alliance v. Babbitt*, 6 F. Supp. 2d 29 (D.D.C. 1998) (stating that if, in following Congress's plain language in statute, agency cannot carry out Congress's intent, remedy is not to distort or ignore Congress's words, but rather to ask Congress to address problem). Based on this analysis, we believe the information specifically described in sections 10806(b)(3)(A) and 15043(c) is indicative of the types of information to which Congress intended to grant a P&A system access. *See Penn. Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 426 n.1 (3rd Cir. 2000) (“[I]t is clear that the definition of ‘records’ in § 10806 controls the types of records to which [the P&A system] ‘shall have access’ under § 10805[.]”).

Upon review, we note the submitted information consists of sheriff's office policies and procedures. DRT does not indicate these policies and procedures pertain specifically to an individual diagnosed with a mental illness or developmental disability. Thus, we conclude DRT has failed to demonstrate the applicability of section 10806 of title 42 of the United States Code or section 15043 of title 42 of the United States Code to this information. Accordingly, DRT does not have a right of access to this information, and we will address the exception claimed by the sheriff's office for the submitted information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This exception encompasses information that is made confidential by other statutes. The sheriff's office raises section 552.101 in conjunction with sections 418.176, 418.177, 418.181, and 418.182 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.176 of the HSA provides in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers of the provider.

Id. § 418.176(a). Section 418.177 provides,

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. Section 418.181 provides,

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. Section 418.182 provides in part:

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Id. § 418.182(a). The fact that information may be related to biological toxins or to a governmental body's security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The sheriff's office claims some of the submitted information is confidential under sections 418.176, 418.177, 418.181, and 418.182 of the Governmental Code. The sheriff's office states some of the information at issue pertains to "the prevention, detection, response to, and/or investigation of criminal activity and the staffing/positioning requirements of law enforcement as it pertains to inmate supervision and security" within the Lubbock County Detention Center [the "center"] and that these records identify security assessments used to protect the public. Upon review, we find some of the information at issue relates to the specifications, operating procedures, or location of a security system used to protect public

or private property from an act of terrorism or related criminal activity. Accordingly, the sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code.³ The sheriff's office also states some of the remaining information pertains to sensitive law enforcement areas in the center, which constitutes critical infrastructure for purposes of section 418.181. *See id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). Further, the sheriff's office states this information reveals locations of entry and exit, as well as alternative pathways, used to transport inmates. The sheriff's office asserts release of such information would reveal vulnerabilities and security gaps in the critical infrastructure and would "jeopardize officer safety" and the ability of the sheriff's office to detect and deter criminal activity. Based on these representations and our review, we conclude the sheriff's office has demonstrated the release of some of the information at issue would identify the technical details of particular vulnerabilities of the critical infrastructure to an act of terrorism. Accordingly, the sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.⁴ Additionally, the sheriff's office states some of the remaining information pertains to "positioning/staffing for law enforcement to use in order to eliminate or reduce criminal activity within the [center]." The sheriff's office asserts release of this information will compromise officer safety and affect the ability of the sheriff's office to detect and deter criminal activity." Upon review, we find the sheriff's office has demonstrated some of the information at issue relates to the staffing requirements or tactical plan of a law enforcement agency and is maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Accordingly, the sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.⁵ However, upon review, we find the sheriff's office has failed to demonstrate the remaining information at issue consists of information that is confidential under section 418.176, section 418.177, section 418.178, section 418.181, or section 418.182 of the Government Code. Therefore, the sheriff's office may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with sections 418.176, 418.177, 418.181, or 418.182 of the Government Code.

In summary, to the extent the information at issue is identical to the information previously requested and ruled upon by this office, the sheriff's office must continue to rely on Open Records Letter Nos. 2020-15716 and 2020-26523 as previous determinations and withhold the identical information in accordance with those rulings. The sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code. The sheriff's office must

³ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁵ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The sheriff's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The sheriff's office must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Joseph Hoggatt
Assistant Attorney General
Open Records Division

JWH/be

Ref: ID# 945832

Enc. Submitted documents

c: Requestor
(w/o enclosures)